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No. 182

Supreme Court of the United States

OCTOBER TERM, 1959

PATRICIA I. BIRNEL, *Appellant*,

vs.

THE TOWN OF FIRCREST, *Appellee*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF IN OPPOSITION TO MOTION TO DISMISS

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Appellee's motion to dismiss appears to rest on the ground that the question presented by this appeal, having been before the court in three prior cases, is not substantial. Appellee concedes that appellant's statement of the question and statement of the case are correct.

Appellant submits that the question raised by this appeal has never been presented to this court before and was not passed upon by the decisions of the state courts relied upon by appellee.

The first of the fluoridation cases was *DeAryan v. Butler* (Aug. 13, 1953) 119 Cal. App. 674, 260 P.(2d) 98 (No. 651, cert. den.), 347 U.S. 1012, 76 S.Ct. 67, 100 L.Ed. 743. This case was argued by the plaintiffs *in propria persona*. From the reported opinion of the state appellate court it does not appear that any suggestion was made that there were available, if indeed there were

at that time available, economical and safe methods of administering fluoride to persons desiring it other than by adding it to the public water supply, as has been alleged in the instant case and as is admitted for the purposes of the demurrer. Neither was it made to appear in the *DeAryan* case that a pathological condition known as mottled enamel habitually afflicts the enamel structure of the teeth of some of the children consuming water having a fluoride concentration within the approved range, as is admitted for the purposes of this litigation (Tr. 3). In the *DeAryan* case one witness testified that moderate fluorosis was a "probability." Here it is conceded as a certainty.

The next case was *Chapman v. City of Shreveport*, 225 La. 859, 74 S.(2d) 142 (No. 407, app. dis.), 348 U.S. 892, decided May 31, 1954. In that case there was only a general allegation that fluoride might cause harm to the aged and ill, and no proof was offered at the trial in support of the allegation. There was no suggestion that the benefits sought from fluoride were available through other means than adding it to the public water supply, and, of course, we do not know whether or not other means were then readily available.

On June 15, 1954, the Supreme Court of Oklahoma decided *Dowell v. City of Tulsa*, Okla., 273 P.(2d) 859. No review of the decision was sought in this court. From the opinion of the state court it does not appear that any issue of injury to persons drinking water to which fluoride had been added was raised. The issue of private

treatment was raised, although the circumstances surrounding the presentation of the issue were peculiar. At the trial the plaintiffs offered no evidence, but stipulated with the defendants as to certain facts, p. 861. The only witness used at the trial was a public health man, Dr. Paul Haney, Superintendent of Health for the City and County of Tulsa. His testimony was to the effect that treatment of drinking water by individuals without competent medical supervision would be both dangerous and impractical, p. 864, testimony which was probably accurate enough, but which is entirely irrelevant to this case, since no such unsupervised, individual fluoridation of water supplies has been suggested in this case, but it is admitted that fluoride may be administered in carefully controlled amounts, economically and more safely and reliably, to persons desiring it through bottled water containing fluorine in prescribed amounts, in tablet form and in many other ways, and that any such method which permits control of the dosage for each individual is safer and more reliable than adding fluoride to the public water supply (Tr. 3-4, 8, 15).

On December 2, 1954, the Supreme Court of Washington, dividing five to four, decided *Kaul v. Chehalis*, 45 Wn.(2d) 616, 277 P.(2d) 352. In that case neither the fact that some children are habitually afflicted with mottled enamel from consuming water containing fluoride in the approved concentration, nor the fact that there are other means of administering fluoride safely and economically was made to appear. No appeal was taken to this court.

The Supreme Court of Ohio, on June 29, 1955, decided *Kraus v. City of Cleveland*, 163 Ohio St. 559, 127 N.E. (2d) 609 (No. 693, app. dis.), 351 U.S. 935, 76 S.Ct. 833, 100 L.Ed. 1463. The Ohio court stated as quoted by appellee:

> "Although it is admitted that private care would be effective, the record shows that there are not sufficient private dental facilities to perform the task." p. 612.

No lack of sufficient facilities has been claimed in the instant case. Moreover, it appears from the opinion of the trial court in *Kraus v. City of Cleveland* (October 23, 1953), 116 N.E.(2d) 779, that the only private method brought to the attention of the court in that case was topical application of fluoride by a dentist, p. 789. In the instant case, six years later, *it is admitted that fluoride is available safely, economically and more reliably* than through addition to public water supplies, in tablet form, in bottled water and in many other ways (Tr. 3-4).

Thus this is the first case which has presented to this court the question of whether or not an ordinance authorizing the addition of flouride to a municipal water supply in the proportion of one part of fluoride per million parts of water deprives a plaintiff of her liberty without due process of law when it is admitted that:

1. the purpose is to prevent dental caries (Tr. 2);

2. dental caries is not a communicable disease (Tr. 2);

3. a pathological condition known as mottled enamel habitually afflicts the enamel structure of the teeth of

some children consuming water containing fluoride in the authorized concentration and other effects are incompletely known (Tr. 3); and

4. the intended benefits of fluoride may be obtained by those desiring them, through bottled water containing fluorine in prescribed amounts, in tablet form and in many other ways and that *such methods which permit control of dosage for each individual are safer and more reliable than adding fluorides to the public water supply* (Tr. 3-4).

The existence of a reasonable and practicable means of securing the object sought without impairing the rights and liberty of those individuals who do not choose to drink fluoridated water goes straight to the heart of the question of *reasonableness* in exercising the police power, and in this way raises a constitutional question not presented to the court in any of the cases cited in appellee's brief.

More than a year after the last of the above-cited cases had been decided, on December 26, 1956, the Supreme Court of Indiana decided *Teeter v. Municipal City of LaPorte*, 236 Ind. 146, 139 N.E.(2d) 158, which considered all of the above-discussed cases, distinguished them, and in a unanimous opinion reversed a trial court which had sustained a demurrer to a complaint which alleged that fluoride was toxic and might injure some people.

The Indiana court held that it could not hold such allegations untrue as a matter of law. On pages 9-10 of its motion to dismiss this appeal the appellee asks this.

court to "take judicial notice of the fact that no harm can come to any user of public water supplies under rules and regulations of the appropriate health departments [*sic*] of the State of Washington." To take judicial notice of any such absurdity is precisely what the Supreme Court of Indiana correctly held it could not do.

Appellee attempts to distinguish *Teeter v. Municipal City of LaPorte*, 236 Ind. 146, 139 N.E.(2d) 158, on the ground that it was a case of first impression and came before the appellate court on demurrer. All of the above-cited cases were cases of first impression, and this case is before this court on demurrer.

It was on June 26, 1957, long after the rendition of the decisions in all of the above-mentioned cases, that the Supreme Court of Canada affirmed the Ontario Court of Appeal in holding the fluoridation of its public water supply beyond the powers of the Municipality of Metropolitan Toronto in *Municipality of Metropolitan Toronto v. Village of Forest Hill*, 9 D.L.R.(2d) 113. The identical conclusion had been reached by the Appeal Division of the New Brunswick Supreme Court on December 15, 1955, in *The Queen v. Fredericton*, 2 D.L.R. (2d) 551. Although the Toronto case involved the application of a statute rather than a constitution, the bases of the decision quoted in appellant's statement as to jurisdiction on pages 15-16 are equally in point here, and are here presented for the first time. Appellee does not comment on the Canadian decision. A decision of the highest tribunal of Canada should carry great weight with this court, and, at the very least, indicates that the question, admittedly federal, is substantial.

Appellee then argues for the conclusion which is inherent in its position and in the position of all proponents of the fluoridation of public water supplies, namely, that legislative power over the health of individuals is plenary, and may be utilized, subject to no constitutional safeguard, to compel any treatment the legislature deems appropriate for any disease, contagious or non-contagious.

The conclusions the appellee draws from *Jacobson v. Massachusetts* (1905), 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643, make appellant's point admirably. Appellee argues that if the state can compel vaccination to prevent the spread of smallpox, it can compel its residents to submit to any medical (perhaps surgical?) treatment the public health departments and "high medical authorities" deem good for them, and asks this court to judicially notice that "no harm can come to any user of public water supplies under rules and regulations of the appropriate health departments . . ."

At page 7 of its brief, appellee admits that courts have summarily refused to take evidence on the question of harm in reviewing a legislative enactment purporting to benefit the "public health," even when the evidence was offered to prove that vaccination quite often caused serious and permanent injuries to the health of the person vaccinated and occasionally resulted in death. In so doing, appellee admits a well-known historical fact which has alarmed at least one distinguished expert on constitutional law.

"There is always the danger, however, that the court will take judicial notice of a fact which is

> debatable. Indeed, if the doctrine were carried to its logical conclusion, the court would seem to be warranted in ruling out all evidence which did not coincide with its own opinion. This result was actually attained in the vaccination cases. The *dicta* in these decisions go so far from the beaten path that one would be tempted to ignore them as a judicial freak, were they not the solemn declaration of two of the most respected of state courts and also the Supreme Court of the United States. . . . Both attempts to introduce evidence of a scientific nature, tending to prove that vaccination is without value and even dangerous where frustrated by the deep-seated prejudice of the court as to its value." Mott, Due Process of Law, Sec. 218 at page 555.

In short, the courts in the vaccination cases did not feel themselves competent to overrule the "medical judgment" of a small group of individuals, not especially qualified to such a judgment, but who had been elected to the state legislature. The fact that courts have approached the question of police power health regulations in this manner compels those same courts to be constantly alert for unwarranted, unwise, and unnecessary extensions of the power vested in the legislature to make such medical judgments and to compel all the citizens of the state to accept them.

It should be noticed, however, in the *Jacobson* case no one offered to prove that vaccination ***habitually*** killed any substantial number of people or even caused them serious harm.

The *Jacobson* case and all the cases following it until the fluoridation campaign have held that the state may

compel its residents to employ such means as may be available to protect one man from another, to halt or prevent epidemics, to prevent the transmission of feeble-mindedness, and other like conditions from one person to another. To extend this doctrine from communicable diseases or transmittable conditions to admittedly non-communicable diseases which affect only the individual suffering therefrom is an extension of the concept of public health into a wholly novel area.

If Ordinance No. 323 of the Town of Fircrest is a lawful exercise of the police power, then the power of the state to prescribe treatment for the private ailments of its citizens is, as appellee suggests, virtually unlimited. No such implication inheres in the *Jacobson* case which concerned one of the most highly infectious, disfiguring and fatal diseases of the human race.

In *Loan Association v. Topeka* (1874) 20 Wall. 655, 22 L.Ed. 455, this court said at pages 662-663:

> "It must be conceded that there are such rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism. It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of

others, whether it is not wiser that this power should be exercised by one man than by many.

"The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers.

"There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name."

Glib statements on page nine of appellee's motion about the extent of fluoridation, vital statistics, unidentified reports of physicians, and alleged endorsements are demonstrably inaccurate, wholly without support in the record and irrelevant to the issues here before the court.

Appellant believes the difference between a public epidemic of smallpox and a purely personal cavity in the tooth of an individual is sufficiently substantial to warrant consideration of the merits of this case before committing our lives and health to an official bureaucracy.

Respectfully submitted,

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